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AUG 31 1949

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 130*

ALVIE D. KILLIAN,

Petitioner,

VS.

THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLORY & CO., Inc.

Respondents.

PETITIONER'S ANSWER TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

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*Formerly No. 876, October Term, 1948.

CITATIONS.

PAGE

CASES:

Beamer v. Virginian Ry. Co., 181 Va. 650, 26 N. E. (2nd) 42 (Distinguished) 2

Hillsborough T. P. v. Cromwell, 326 U. S. 620, 66 Sct. 445, 451 8

Hurn et al. v. Oursley, 289 U. S. 338, 345-346, 53 Sct. 586, 589 8

James Dickenson, Farm Mortgage Co. v. Harry, 273 U. S. 119, 121, 122 (Distinguished) 10, 11

Siler v. Louisville & N. R. Co., 213 U. S. 175, 191 .. 8

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 Sct. 444, 451 9

United States v. Memphis Cotton Oil Co., 288 U. S. 62, 53 Sct. 278 9

STATUTES:

Illinois Civil Practice Act, Sec. 24, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 148, Subsection 1 6

Illinois Civil Practice Act, Sec. 33, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 157, Subsection 2 6

Illinois Supreme Court Rule 12, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 259.12 6

Title 28 United States Code, Judiciary and Judicial Procedure, Sec. 1257 5

TEXTS:

Clark on Code Pleading, 2nd Ed., pages 127-148 9

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STATEMENT.

Both respondents have filed briefs during the court's recess in opposition to the petition for a writ of certiorari. This reply is presented for filing under Rule 38, Paragraphs 3(a) and 4(a).

*Formerly No. 876, October Term, 1948.

I.

Pennsylvania's brief does not deal with the case presented by the petition and supporting brief.

Pennsylvania, in its brief, does not pretend to answer the petition and supporting brief or the case made by the record. It completely sidesteps the questions raised by the action of the Appellate Court of Illinois in stating the facts differently from the facts in the record, as passed upon by the jury in returning its verdict in favor of petitioner and by the trial court in refusing to allow the motion for a new trial and in proceeding to base its decision in the case upon the facts as restated.

The result is that Pennsylvania, as did the Appellate Court, is talking about an entirely different case than is presented by the record. The case of *Beamer* v. *Virginian Ry. Co.*, 181 Va. 650, 26 E. (2nd) 43, (certiorari denied, 321 U. S. 763), cited in its brief, footnote at Page 11, is a good illustration of this fact.

In that case Beamer was employed by the railroad at its electric generating plant at Narrows, Virginia. The plant had been designed and constructed by a New York firm of engineers, Gibbs and Hill. Beamer was originally employed by this firm as a steamfitter in the construction of the plant. When the plant was completed, he was taken over by the railroad to work for it at the new plant in the same capacity. At the time of his death out of which the suit arose, he had been employed by the railroad in that capacity for fifteen years. His services had been satisfactory and he was more familiar with the system of pipes in the plant than any other employee.

The day before the accident, Turbine No. 1 at the plant was not functioning properly. The general foreman di-

rected Beamer to inspect it, discover and remedy the trouble. He was employed to do this type of work.

Beamer found the trouble in the heater line. A large expansion joint in that line running to the turbine was broken. Beamer reported this to the foreman and gave reasons why the joint should be replaced with a new part, rather than to attempt to repair it. The foreman directed him to replace it with a new joint which he proceeded to do on the following day.

The place where Beamer and his helper must work in replacing the joint was very hot. An hour after his death it was found to be 132 degrees F. There was a natural and normal accumulation of dust on the pipes.

An air hose was available for Beamer's use for any needed purpose and particularly to create a better circulation of air to cool him and his helper. He did not use it for the reason that it would stir up the dust and render the air unfit to breathe. That, of course, was his decision.

The work required two hours and a half. After finishing the work, Beamer sat outside to cool off for a while and then walked a short distance into the machine shop where he collapsed and died.

There, as here, the gist of the action was failure to provide a reasonably safe place to work.

There was no evidence that anyone except Beamer and perhaps his helper knew or had any occasion to know anything more about the place where the joint was to be repaired than that it was hot.

There was a verdict for the plaintiff for $10,000.00 which on motion was set aside by the trial court and judgment entered for the defendant. The case went to the Supreme Court of Virginia.

The case is a fairly good example of where an employee competent for the purpose, is sent into a dangerous place to make repairs. Beamer and Beamer alone was qualified to inspect the place and to determine whether or not it was safe and to render it as safe as such a place could be made. There was nothing wrong with the construction of the plant or with the method of operation. He was furnished a hose to reduce the heat so as to meet, in part at least, the only hazard that was known or could have been known to his superiors. The necessity for the repairs that he was ordered to make furnished the only occasion for learning about the natural and normal accumulation of dust on the pipes. It was for him to determine whether he would first use the air hose to blow the dust away and then use the air to cool the temperature. The place of work was, therefore, safe or unsafe, according to his own judgment of how best to proceed to make the replacement of the broken expansion joint.

The Virginia Supreme Court, on these facts, affirmed the judgment of the trial court in setting aside the verdict.

Beamer is the type of case stated and decided by the Appellate Court. It is the type of case stated and argued here by Pennsylvania, but it is not the type of case presented by the record.

The jury and the trial court in the case at bar reached a verdict and judgment on the basis of a group of operative facts that made a case entirely different from the *Beamer* case.

In the case made by the record the duty of making the place safe rested upon the respondents who had timely warning. The Appellate Court, by ignoring the vital facts, selected and stated a group of operative facts that was entirely different from that revealed by the record and

proceeded to pass upon the facts as restated and to come to a different conclusion than that reached by the jury and the trial court.

It is to invoke this Court's power of revision and correction of such action by a state court that we have presented the petition in this case. Pennsylvania has not answered the petition.

II.

Jurisdiction as to Mallory.

Mallory, in its brief, does not answer the petition on the merits of the case. It challenges the jurisdiction of the Court insofar as it is concerned and moves to dismiss as to it.

Petitioner, in his petition and supporting brief, invokes the jurisdiction of the Court under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3. Jurisdiction is placed upon the grounds that the judgment to be reviewed is a decision involving rights, privileges and immunities specially set up or claimed by petitioner under a United States Statute, The Federal Employers' Liability Act (Petition 4, Brief 9).

We made no separate jurisdictional claim insofar as Mallory is concerned. Under settled rules announced by the Court over the long period of its history, we deemed it unnecessary to assume that a motion to dismiss would be made by this respondent on jurisdictional grounds, since there is a substantial federal question in the case. Until such motion was made, such a statement, we believe, was not essential.

The reasons advanced for the contention that "this Court lacks jurisdiction of *this cause* so far as this re-

spondent is concerned" (Mallory Brief, Page 1, Italics ours), might have merit had this suit been filed against Mallory alone. We concede also, that jurisdiction, as to this respondent, is not invoked by the mere joinder of Mallory as a party defendant with Pennslyvania, which is subject to the provision of a federal statute. "*This cause,*" as correctly used in the above quoted language from the brief, is the key to the problem.

The Illinois Statutes provide[1]:

> "Any person may be made a defendant * * * against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions regardless of the number of causes of action joined."

The Illinois Statutes further provide as to the pleadings[2]:

> "(2) Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be, a separate allegation."

Illinois Supreme Court Rules provide as to pleading of law matters[3]:

> "Different breaches of a contract, bond or other obligation, and different breaches of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts, may be treated as a single claim or cause of action, and set up in the same count."

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[1] Civil Practice Act, Sec. 24, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 148, Sub-section 1.
[2] Civil Pract Act, Sec. 33, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 157, Sub-section 2.
[3] Supreme Court Rule 12, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 259.12.

Pennsylvania is sued here under the Federal Employers' Liability Act (R. 42). That respondent admits in its answer that both petitioner, its employee, and respondent were at the time of the accident engaged in Interstate Commerce and that both were subject to the provisions of the Federal Employers' Liability Act (R. 49).

Plaintiff resides in Indianapolis, Indiana (R. 92). Mallory is a Delaware corporation, authorized to do business in Illinois; has a registered agent at 33 North LaSalle Street, Chicago, Illinois, which was served with process and is sued at Common Law (R. 42, 43). This respondent could have been sued in a federal court on diversity grounds.

The complaint is in one count. After alleging the facts setting forth the cause of action, it is further alleged (R. 44-45):

> "Defendants, at the time and place set forth, wholly regardless of their duty toward the plaintiff, were guilty of the following joint and several acts and omissions, in one or more particulars, which concurred and combined to cause the accident and injury to the plaintiff."

Then follows (R. 45-47) allegations of specific breaches of duty, the gist of which is that Pennsylvania failed to provide a reasonably safe place to work and Mallory failed to maintain its premises in a manner to make the same reasonably safe for plaintiff, an invitee, to perform the duties required of him there.

It is then alleged (R. 47) that, as a direct and proximate result of one or more of the foregoing acts of negligence, the plaintiff was injured.

The foregoing provisions of the Illinois Statutes and the facts constituting the cause of action, as set forth in

the complaint, together with the evidence in the record form the basis for deciding the jurisdictional question raised by Mallory.

There is a definite and substantial federal question involved. This gives the Court jurisdiction of the case. A federal court having acquired jurisdiction by reason of a substantial federal question involved, has the right to decide all questions in the case, even though it decided the federal questions adversely to the party raising them or even if it omitted to decide them at all, but decided the case on local or state issues only.[4]

This Court has that right.[5]

The rule has been limited by this Court as follows[6]:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the nonfederal cause of action."

Under all of the tests used by the courts and law writers to determine whether there is but a single cause of action involved or whether two or more separate and distinct causes are presented, the case at bar involves but a single

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[4] *Hillsborough T. P. v. Cromwell*, 326 U. S. 620, 66 SCt. 445, 451 and cases there cited.

[5] *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191.

[6] *Hurn, et al. v. Oursley*, 289 U. S. 338, 245-246, 53 SCt. 586, 589.

cause of action and falls within the requirement of the rule as above quoted.

The facts forming the basis upon which petitioner claims relief in this case constitutes a single transaction or occurrence; there is but one group of facts revealing but a single wrong and a single indivisible injury to the petitioner for which he may have but one recovery. While he exercised his right to sue his employer under the federal statute and Mallory at the common law, liability of both respondents is to be determined under the general rule defining negligence as the lack of care under the circumstances.[7] There is but one single group of operative facts. It is, therefore, not possible to separate these intertwined facts, or the common questions of both fact and law into two causes of action, whether the historical test, or the test adopted by courts and law writers under the Codes, which have put an end to the era of writs and remedies, is applied[8].

Mallory does not contend that there is more than one cause of action here. It merely says (Mallory Brief 7-8) that the judgment or the questions, as between Pennsylvania and Mallory, are severable.

Petitioner asked for a single judgment "against the defendants, or either of them." (R. 48.)

The jury returned its verdict, finding the defendants, Pennsylvania and Mallory, guilty, and assessed petitioner's damages at the sum of $10,000.00 (R. 66). Judgment was entered on this verdict that the plaintiff recover from Pennsylvania and Mallory the sum of $10,000.00 (R. 67).

There is no rule of law giving to this verdict and judgment any quality of severability.

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[7] *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 Sct. 444, at page 451.

[8] *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 53 SCt. 278, at page 280; Clark, On Code Pleading, 2nd Ed., Pages 127-148.

To say that the questions presented by several parties "as they are in this case" are severable, is without any significance. The applicable rule assumes that there will be questions in a case of this kind, some referable to local law and some to federal law.

It is said (Mallory Brief 7) that jurisdiction as to one party does not impart jurisdiction as to the other party.

The applicable rule contemplates jurisdiction of the case and of course of the parties by reason of the ingredient furnished by a substantial federal question. Such jurisdiction gives the Court the right to decide all of the questions in the case, whether of a local or federal nature. The mere fact that on this account the questions may be distinct or different or severable is not material.

Mallory, at page 8 of its brief, cites *James-Dickinson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119, in support of its theory of severable judgments and severable questions.

In that case, suit was brought in an Illinois state court against Dickinson an individual and the James-Dickinson Company a corporation. By reason of diversity of citizenship, the cause was removed to a federal court.

Service was properly had upon Dickinson individually. Service was had upon the corporation by serving Dickinson as its president, while he was temporarily in the State of Illinois on business of the company. The company challenged the jurisdiction of the Court, as to it, on the ground of improper service of process. Its objections were overruled and it pleaded to the merits.

The plaintiff got a verdict and judgment. Because of a claim that rights guaranteed by the Fourteenth Amendment had been denied the defendants, a direct writ of error was allowed under Section 238 of the Judicial Code then in force.

The Court said (Page 121):

> "In the course of the trial, a multitude of requests for rulings made by the defendants, were denied. Many other rulings to which they objected were given. Exceptions were duly taken. As the case is properly here on constitutional grounds, the jurisdiction of this Court extends to a review of all questions. *Chaloner* v. *Sherman*, 242 U. S. 455, 457. All have been considered. Only a few require discussion."

The Court proceeded to consider the question of the company's objection to the jurisdiction on the grounds of improper service and said (Page 122):

> "* * * The objection to the jurisdiction over the corporation should have been sustained. As it was not waived by the later proceeding in the case, the judgment against this defendant is reversed with directions to dismiss the action as to it. This reversal does not require that the judgment be reversed also as to Dickinson. * * *"

Thus it is made clear that the state court where the suit was filed never acquired jurisdiction of the company and since the state court lacked jurisdiction, the federal court to which the case was removed never acquired jurisdiction. There was, therefore, no question of jurisdiction over the company in this Court, but the Court having jurisdiction of the case by reason of the federal question, proceeded to decide all of the questions in the case, including the one of improper service.

Moreover, it was not a question of the judgment becoming severable in this Court or of the questions in the case being severable as between the parties. Since the lower federal and state courts lacked jurisdiction of the company, there was no valid judgment, at all, insofar as it was concerned. Since the judgment was valid as to Dickinson, the lower court was reversed on its ruling on the question

of improper service on the company and the judgment was affirmed as to Dickinson.

We respectfully submit that Mallory's motion to dismiss as to it, should be overruled and the case disposed of on its merits as to both respondents.

Respectfully submitted,

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